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August 8, 2017

VIA HAND DELIVERY

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Office of Administrative Law Judges  
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Re: OFCCP v Oracle America, Inc.  
OALJ Case No. 2017-OFC-00006

RECEIVED

AUG 08 2017

Office of Administrative Law Judges  
San Francisco, Ca

Dear Judge Larsen:

I write on behalf of Oracle America, Inc. ("Oracle") in response to your honor's July 20, 2017 Order on Pending Discovery Disputes.

As this Court has recognized, OFCCP has "accuse[d] [Oracle] of something so nasty that [people] say prayers of gratitude every morning that no one has accused us of that." CMC Transcript (May 9, 2017). Astonishingly, however, having made such allegations, OFCCP has yet to disclose to Oracle the basic facts and legal theories that form the basis of OFCCP's lawsuit. Shortly after OFCCP initiated this litigation, Oracle diligently served a first set of requests for production of documents on February 8, 2017; an amended set of special interrogatories on June 12, 2017; and a 30(b)(6) deposition notice on May 31, 2017. ***All three of these discovery requests closely track the allegations in OFCCP's Amended Complaint***, and merely ask OFCCP to disclose to Oracle – having very publicly<sup>1</sup> accused it of widespread recruiting, hiring and compensation discrimination – the facts that purportedly support those allegations. This is Basic Discovery 101. There is no question that more than six months into litigation, OFCCP has an obligation to provide meaningful

<sup>1</sup> Instead of providing information to Oracle in this litigation, OFCCP would rather provide information to the press. See Google Deliberately Confuses Its Employees, Fed Says <https://www.wired.com/story/google-department-of-labor-gender-pay-lawsuit/> (July 25, 2017) ("[OFCCP regional solicitor Janet] Herold says her office could bring a statistical-based enforcement using the data. . . . **In Oracle's case, the DOL found a standard deviation between 7 and 10, she says**") (emphasis added). OFCCP also issued a press release announcing its litigation against Oracle and containing a link to the Amended Complaint, which continues to reside on the landing page of OFCCP's website. <https://www.dol.gov/newsroom/releases/ofccp/ofccp20170118-0>.



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responses and documents. Instead, with rare exception, OFCCP has merely produced back to Oracle the documentation Oracle produced to OFCCP in the underlying compliance review.

By contrast, and in addition to the extensive information and documentation Oracle already produced during the underlying compliance review, Oracle has produced more than 20,000 pages of documents and nine witnesses in response to OFCCP's 30(b)(6) deposition notice, and has agreed to produce additional 30(b)(6) witnesses and fact witnesses. Additionally, Oracle has agreed to produce thousands more pages of responsive documents – including emails – and has agreed not only to produce – but to create – an extensive database containing the job and compensation histories (including starting salaries, in some cases dating back several years) for thousands of Oracle employees, as well as extensive applicant information.<sup>2</sup>

Indeed, given Oracle's good-faith efforts and willingness to compromise, the parties have resolved almost all outstanding disputes with respect to OFCCP's discovery requests to Oracle. OFCCP, however, has stonewalled throughout this process, and taken wholly unreasonable positions. Accordingly, almost no issues have been resolved with respect to Oracle's discovery requests to OFCCP. Accordingly, the parties need the ALJ's assistance in resolving their outstanding discovery disputes. Oracle requests the opportunity to brief these issues – particularly the complicated and important issue of employee contact information (briefly addressed in Section II, A, below).

**I. ORACLE IS ENTITLED TO DISCOVER THE FACTS THAT UNDERLIE THE COMPLAINT AND OFCCP HAS NOT BEEN FORTHCOMING<sup>3</sup>**

**A. OFCCP's Document Production and Assertions of Privilege are Deficient**

Oracle's position: Oracle's requests for documents track the allegations in the Amended Complaint. Specifically, Oracle is seeking documents related to (1) **statistical studies and comparisons** related

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<sup>2</sup> The database of job and salary history information that Oracle is creating for OFCCP here is exactly the type of information that Judge Berlin ordered Google was **not** obligated to produce in *OFCCP v. Google*, in part because of the incredible burden involved.

<sup>3</sup> At OFCCP's insistence, Oracle has met and conferred with OFCCP for more than 20 hours regarding 86 document requests, 25 interrogatories and ten 30(b)(6) deposition topics. During these meet and confer calls, OFCCP has feigned confusion over basic terms that appear in its own operative pleading, like "compliance review," or claim that terms like "related to" are overbroad, even though OFCCP has used the same term and Oracle agreed to adopt OFCCP's definition of the term. To say the least, the process has been inefficient.

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to the allegations in the Amended Complaint<sup>4</sup>; (2) the identities of the **alleged victims** of discrimination and alleged qualified **comparators**, and **how OFCCP determined** both sets of groups<sup>5</sup>; (3) **interviews** conducted, particularly documents that OFCCP is required to maintain pursuant to the Federal Contract Compliance Manual 2M00.f<sup>6</sup>; (4) **audit/compliance review** documents related to OFCCP's claim that Oracle refused to provide information in the audit<sup>7</sup>; (5) the **specific allegations of discrimination** contained in OFCCP's complaint<sup>8</sup>; (6) the **specific allegations that Oracle failed to conduct compensation or adverse impact analyses**<sup>9</sup>; (7) whether OFCCP made "reasonable efforts" to **conciliate** prior to bringing litigation<sup>10</sup>; (8) **communications with third parties** regarding the allegations in the Amended Complaint<sup>11</sup>; and (9) **case files** regarding the allegations in the Amended Complaint.<sup>12</sup>

In response to Oracle's document requests, OFCCP produced Oracle's documents back to it in an effort to appear forthcoming, and limited its production to non-privileged documents contained in its "investigation file." On August 3, 2017, OFCCP represented it was agreeable to producing "non-privileged, non-public, relevant, non-Oracle produced responsive documents within this Region," yet subsequent correspondence makes it unclear if OFCCP is willing to keep this commitment. Even limiting discovery to this Region, however, is still insufficient. OFCCP refuses to search for – much less produce – documents in its national office or other offices, even though it has identified at least one witness located in another office and OFCCP refuses to provide any assurance that there are not relevant documents contained in those other offices.

Furthermore, Oracle is unable to determine the magnitude of documents OFCCP is withholding based on purported privileges. Not only is OFCCP's privilege log hopelessly vague, ambiguous and legally deficient, but many of OFCCP's asserted privileges – including the deliberative process

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More fundamentally, however, given the nature of the "concerns" expressed by OFCCP, this process and the subjects covered reflect a clear recalcitrance to producing basic discovery to which Oracle is entitled.

<sup>4</sup> Oracle RFP Nos. 8-11, 14, 16, 24-25, 28, 30, 33, 28, 38-39, 42, 44, 47, 52, 54, 61, 64, 74-78, 80-81.

<sup>5</sup> Oracle RFP Nos. 5-7, 12-13, 21-23, 26-27, 35-37, 40-41, 48-51.

<sup>6</sup> Oracle RFP Nos. 17, 31, 45, 62, 83.

<sup>7</sup> Oracle RFP Nos. 1, 65, 82.

<sup>8</sup> Oracle RFP Nos. 2-4, 20, 26, 34, 40, 48, 53, 55-59, 86.

<sup>9</sup> Oracle RFP Nos. 66-69, 73.

<sup>10</sup> Oracle RFP Nos. 71-72.

<sup>11</sup> Oracle RFP Nos. 18, 32, 46, 63, 85.

<sup>12</sup> Oracle RFPs, 15, 29, 43, 60. Oracle has withdrawn its RFPs Nos. 19, 70 and 79.



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privilege, informant's privilege, "investigative files" privilege, work product privilege, attorney-client privilege, and trial preparation privilege – do not apply, are limited in scope, have been waived, or should be overruled.<sup>13</sup>

OFCCP's position: OFCCP has lodged a multitude of meritless objections against Oracle's requests, most often stating that it is confused about the requests or believes the requests are overbroad, even though they track the allegations in the Amended Complaint. OFCCP also attempts to justify its objections by (inaccurately) arguing Oracle has made those same objections, and by contending its failure to respond in a more meaningful way to Oracle's discovery is due to Oracle's alleged "refusal" to produce information to OFCCP. But this circular reasoning must be rejected. Even setting aside OFCCP's 18-month compliance review, Rule 11 mandates that OFCCP had to have some basis for bringing this massive, high-profile lawsuit that it touts to the press. Oracle is entitled to know that basis, and is entitled to know it *now*.

**B. OFCCP Has Failed to Respond Fully to Oracle's Interrogatories 1-21 and Completely Failed to Respond to Interrogatories 22-25**

Oracle's position: Oracle's 25 amended interrogatories<sup>14</sup> to OFCCP seek information regarding the facts that support OFCCP's allegations, including statistical analysis and alleged comparator, similarly situated, and qualified individuals; names and contact information for certain individuals with knowledge of the allegations in the complaint; anecdotal evidence of discrimination; and the policies, practices, procedures, and tests (if any) that OFCCP contends have a disparate impact. OFCCP "responded" to 21 of Oracle's interrogatories, but the responses are either incomplete, deficient recitations of OFCCP's allegations in the Amended Complaint or generic descriptions of information, and/or they simply refer to OFCCP's document production. OFCCP completely failed to respond to four interrogatories, 22, 23, 24 and 25.

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<sup>13</sup> Although the parties disagree about the application, scope, and waiver of privileges, Oracle does not believe the parties have sufficiently met and conferred over privilege logs, and further believes it is premature to address the issue of privilege logs now, while the scope of the parties' document productions remains in dispute, and is ongoing. In correspondence dated August 7 (yesterday), however, OFCCP indicated it may raise the issue of privilege logs with the Court today. Oracle's position is that it will produce a privilege log once its document production is substantially complete, and expects OFCCP to amend its current privilege log, as currently it is vague, ambiguous and insufficiently describes what is being withheld, and on what basis.

<sup>14</sup> The parties agreed that Oracle would propound 25 amended interrogatories on OFCCP without prejudice to Oracle's ability to request leave to propound more, if necessary.

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OFCCP's position: OFCCP claims Oracle's interrogatories are "premature" at this stage of the litigation and that Oracle has impermissibly exceeded 25 interrogatories. Neither position has merit.

**C. OFCCP Has Agreed to Produce a Witness on Only One Topic in Response to Oracle's 30(b)(6) Deposition Notice**

Oracle's position: Oracle's 30(b)(6) deposition notice could not be more straightforward. It asks OFCCP to designate a witness to testify regarding nine topics including the facts and statistical analysis supporting the allegations in paragraphs 7, 8, 9, 10, 12 and 13 in the Amended Complaint; the policies, procedures, processes, or tests (if any) that OFCCP contends resulted in a disparate impact; anecdotal evidence of discrimination; and information about the documents concerning these topics. OFCCP refuses to produce witnesses in response to this deposition notice with one exception: on August 3, 2017, OFCCP agreed to produce a witness to testify about the basis for OFCCP's claim that during the audit, Oracle "refused to produce" responsive documents.

OFCCP's position: OFCCP claims it does not have enough information to produce a witness on these topics related to its Amended Complaint. If, in fact, this is true, Oracle is entitled to an admission from OFCCP *on the record* that it did not have any factual basis for bringing its lawsuit against Oracle when it did. For this reason, Oracle is entitled to depose OFCCP's 30(b)(6) witnesses *now*, and before Oracle produces witnesses and additional data and documents to OFCCP.

**II. OFCCP'S DISCOVERY REQUESTS ARE OVERBROAD AND DISPROPORTIONATELY BURDENSOME**

Given OFCCP's position that it cannot disclose to Oracle the basic facts and legal theories underlying its Amended Complaint because it does not have them and still needs to learn those facts through discovery, it is clear OFCCP is *not* tailoring its discovery requests in any meaningful way, but instead hopes to find the proverbial needle in the haystack by serving overbroad, unduly burdensome discovery requests that are not proportionate to the scope of the litigation.

**A. OFCCP's Requests for Contact Information are Overly Broad, Disproportionate, and Implicate the Privacy Rights of Oracle's Employees**

Oracle's position: OFCCP has requested "[c]ontact information for all current and former employees in the PT1 job group and Product Development, Information Technology, and Support lines of business during the RELEVANT TIME PERIOD, including: full name, home address,

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**home phone number, mobile phone number, and home/personal email address.”** This request encompasses **several thousand** current and former employees. It is also overbroad in scope, unduly burdensome, disproportional to the needs of the case, and seeks confidential information that invades the privacy rights of individuals who are not a party to this action. In light of the Court’s July 20, 2017 Order referring to the *OFCCP v. Google* decision, Oracle offered to produce contact information for 20 percent of the individual contributor (*i.e.*, non-managerial) class members from the Product Development, IT, and Support lines of business, subject to a *Belaire* process administered by a third-party administrator, by which employees are provided notice and the opportunity to opt out of having their personal information disclosed by Oracle.<sup>15</sup> Oracle’s proposal provides OFCCP with a tailored and appropriate set of information while mitigating many of Oracle’s concerns relating to overbreadth and privacy. The *Belaire* process Oracle suggests here also was approved by the California Supreme Court in its recent decision of *Williams v. Superior Court*. A *Belaire* process is particularly appropriate here, as (a) there is no “attorney’s eyes only” provision to the protective order, (b) OFCCP can keep the information in perpetuity, (c) OFCCP can share it with other government agencies including the EEOC, (d) OFCCP can use it in other Oracle matters, and (e) OFCCP refuses to limit its request to names and addresses only (and instead insists on **home and mobile telephone numbers and personal email addresses**).<sup>16</sup>

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<sup>15</sup> In *Google*, Judge Berlin described in great detail the risks of improper access (such as hacking) of government systems and the impact on employees’ personal private information in government files. He did not address or decide, however, the employees’ right of privacy under the California and U.S. constitutions (as well as under common law), nor did OFCCP raise this issue in its July 14 letter to the Court even though the California Supreme Court recently addressed the issue in a private class action context. See *Williams v. Superior Court*, No. S227228, 2017 WL 2980258 (Cal. July 13, 2017).

<sup>16</sup> Oracle does not include here an analysis of the significant body of case law confirming that a *Belaire* process is appropriate, but instead requests briefing on the issue and for now, directs the Court’s attention to three recent federal cases in California where a *Belaire* process was ordered under circumstances less egregious than in this case. See *Murphy v. Target Corp.*, No. 09CV1436-AJB WMC, 2011 WL 2413439 (S.D. Cal. June 14, 2011) (ordering an opt-out *Belaire* procedure for contact information for 10 percent of the class because “employees likely provided their contact information to Target as a condition of employment and with the understanding or expectation that Target would not disclose this information externally”); *Aldapa v. Fowler Packing Co. Inc.*, 310 F.R.D. 583, 589 (E.D. Cal. 2015) (ordering an opt-out *Belaire* procedure for a sampling of contact information, even though there was already a protective order in place); *Willner v. Manpower, Inc.*, No. C 11-2846 JST (MEJ), 2012 WL 4902994 (N.D. Cal. Mar. 27, 2013) (ordering an opt-out *Belaire* procedure despite existence of a protective order where the information sought included telephone numbers because “[c]ontact by telephone constitutes a more serious invasion of privacy because the putative class members cannot ignore a telephone call the same way they can ignore a solicitation that arrives by mail”).



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OFCCP's position: During the meet and confer process, OFCCP explained that it intends to seek the contact information for only the purported "victim" class, meaning the individuals OFCCP claims Oracle discriminated against at HQCA. Yet this request still encompasses thousands of current and former Oracle employees, some of whom are managers senior enough to bind the company, and some of whom make the very compensation and hiring decisions that OFCCP claims constitute discrimination against other class members. OFCCP also claims the protective order is sufficient to protect these employees' contact information. But as described above, the protective order here is not nearly strong enough to alleviate Oracle's concerns, nor does it address Oracle's concerns about providing the constitutionally-protected contact information to the government, a *party* to this litigation. It also fails to address Oracle's concerns about security.

Given the importance and magnitude of this issue concerning employee contact information, Oracle respectfully requests the opportunity to fully brief it through motion practice.

**B. OFCCP's Requests for So-Called "Mandated Analyses" Are Based On a False Premise and Seek Documents Not Relevant to This Litigation**

Oracle's position: OFCCP seeks adverse impact analyses and validity studies purportedly "required" by the Uniform Guidelines on Employee Selection Procedures,<sup>17</sup> as well as "internal pay equity analyses" and "analyses of the total employment process" purportedly required by OFCCP's regulations. With respect to the adverse impact analyses and validity studies, these requests are overbroad and seek information not relevant to OFCCP's claims, as neither the Amended Complaint nor the Notice of Violation ("NOV") allege that Oracle engaged in disparate impact discrimination, nor do they allege Oracle used an employee selection device that has an adverse impact. Similarly, OFCCP's interrogatory responses do not identify any employee selection procedure at issue in this litigation.<sup>18</sup> With respect to any internal pay equity analyses, any such analyses are *not* mandated by OFCCP's regulations (as claimed by OFCCP), and to the extent Oracle conducted any other analyses regarding its compensation data, they are privileged. Similarly, despite multiple requests from Oracle, OFCCP has failed to clarify the documents it seeks related to any "analyses of the total employment process," which Oracle has asserted is vague, ambiguous, overbroad, and unduly burdensome.

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<sup>17</sup> OFCCP RFP Nos. 78, 79, 87 and 88.

<sup>18</sup> Even if an employee selection device had been identified by OFCCP and was at issue here, any adverse impact analysis or validity study conducted by Oracle or on Oracle's behalf very likely would be covered by the attorney-client privilege and/or attorney work product doctrine.

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OFCCP's position: OFCCP claims these analyses are relevant and not privileged. It relies on *OFCCP v. JBS USA Holdings*, No. 2015-OFC-1 (OALJ Nov. 25, 2016) in support of its position, which it submitted to the Court on July 14, 2017. That order is inapposite, however, both because there was no dispute regarding the relevancy of the internal audits, and because the ALJ found they were not privileged based on the specific facts and circumstances at issue in that case.

**C. The Court Should Not Impose OFCCP's Arbitrary and Premature Schedule for Document Production**

Oracle's position: OFCCP has asked this Court to impose on Oracle a unilateral production schedule based on arbitrary dates selected by OFCCP. While Oracle is working in good faith to obtain, review, and produce the documents and data requested by OFCCP as quickly as possible, it simply cannot set a specific date for completion at this time given the many variables<sup>19</sup> and complexities involved in obtaining this information. Moreover, as illustrated by this letter, the parties need the Court's assistance in resolving their outstanding discovery disputes, which in turn will inform the scope of both sides' discovery obligations. Before these outstanding discovery disputes are resolved, it is impossible to say how long it will take either side to complete its document production.

OFCCP's position: OFCCP claims a production schedule is needed for discovery to proceed in a timely, orderly fashion. But OFCCP ignores that its requests are overbroad, unduly burdensome, and disproportionate to the needs of this case. OFCCP cannot have it both ways. It cannot ignore the magnitude and scope of the discovery obligations it seeks to impose on Oracle, while at the same time expect Oracle to meet those obligations in an unreasonably short time period.

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<sup>19</sup> One such variable is the Court's final decision on the end date for liability and discovery in this matter, following the Court's June 19, 2017 Order to Show Cause. Another variable is the ongoing process of email production, whereby the parties agreed to certain search terms and/or date parameters for the review of an initial sample set of emails, but will need to meet and confer further regarding the ultimate scope and use of search terms (if any) to be used for emails beyond the initial sample set.





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We look forward to discussing these issues further with you on August 14, 2017.

Respectfully submitted,

A handwritten signature in cursive script that reads "Erin M. Connell".

Erin M. Connell, Esq.

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